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No. 94-1876

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In the

Supreme Court of the United States

October Term, 1994

MICHAEL MAUK AND SYLVIA MAUK,
Petitioners,

v.

DAVID A. ENGLE, DIRECTOR OF THE WASHINGTON COUNTY DEPARTMENT OF SOCIAL SERVICES,
Respondent.

On Petition For A Writ Of Certiorari
To The Court of Special Appeals of Maryland

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the Maryland Court of Special Appeals' finding that the trial court did not abuse its discretion in denying Petitioners' petition to adopt Tiffany R. and in approving Tiffany's adoption by the S. family rendered Petitioners' claims for declaratory and injunctive relief moot.

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COUNTERSTATEMENT OF THE CASE

On December 13, 1991, the Washington County Department of Social Services (hereinafter "WCDSS" or "the Department") filed in the Circuit Court for Washington County, Maryland, a petition for guardianship with the right to consent to adoption on behalf of Petitioners' foster child, Tiffany R., and her biological siblings. (App. 2). The court granted that petition on June 23, 1992. While that petition was pending, WCDSS removed Tiffany from Petitioners' home, where it had placed her as a foster child, and placed her with Mr. and Mrs. S., who were caring for her two brothers. (App. 2, 8). Tiffany, her brothers, and the S. family are African-American. Petitioners are white.

The Petitioners intervened in the guardianship case and filed a petition to adopt Tiffany. Mr. and Mrs. S. also filed a petition to adopt Tiffany, as well as her two siblings. WCDSS consented to the S. family adopting all three children. On May 6, 1993, the circuit court decreed the adoption of Tiffany by Mr. and Mrs. S.[1] (App. 10).

In granting Mr. and Mrs. S.'s adoption petition, the trial court acknowledged that the "same-racial makeup" of Mr. and Mrs. S. and the children was a factor, but not the "overriding" factor. (App. 19). The court cited, as the determinative factor, the expert testimony suggesting that removing Tiffany from the S. family would have a negative impact on her development. (App. 19). The Maryland Court of Special Appeals upheld the lower court's decision, finding that the trial judge made "a well-informed and rational decision when it concluded that Tiffany's interests would best be served by adoptive placement with the S. family." (App. 19-20).

The Petitioners do not seek review of the adoption decision. Instead, they seek review of a companion case that they filed under 42 U.S.C. § 1983 on January 21, 1993, also in state court, individually, as taxpayers, and as next friends of Tiffany R.,[2] challenging the Department's decision to place

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[1] The S.s' adoption of Tiffany's biological brothers was finalized in December, 1992.

[2] Petitioners lack capacity under Maryland law to sue on Tiffany's behalf. When a minor has an actionable claim, she may sue only "by a guardian or other like fiduciary, or, if none, by next friend. Md. Rule 2-202(b) (emphasis added). Petitioners are not Tiffany's guardians or fiduciaries. The Maryland Court of Special Appeals correctly found that the decree of adoption made Mr. and Mrs. S. her "definitive guardians." (App. 26). The court also correctly noted that the Petitioners' "own interests in the outcome of the § 1983 litigation, in fact, may conflict with Tiffany R.'s best interests." (App. 26).

Tiffany with her siblings in the S. home. The gravamen of this action is that, by placing Tiffany with an African-American family, WCDSS violated their right to substantive due process and equal protection under the Fourteenth Amendment of the United States Constitution.

In their § 1983 action, Petitioners sought a declaration that the Department's refusal to consent to their adoption of Tiffany constituted discrimination. They also asked for injunctive relief affirmatively ordering the local department to consent to their adoption of Tiffany. Finally, Petitioners requested that WCDSS be enjoined from any future use of race as a decisive or primary factor in adoption decisions.

The Maryland Court of Special Appeals found that, because Tiffany was no longer available for adoption, "the injunctive and declaratory relief sought by [Petitioners] had become effectively moot . . . ." (App. 30). The court also found that Petitioners' request for prospective relief on behalf of persons other than themselves was similarly non-justiciable because they alleged, at most, only a "misapplication of" Maryland law peculiar to their case. (App. 21, 27). Petitioners never disputed the constitutionality of Maryland's statutory scheme that prohibits adoption agencies from placing children based solely upon their race, but allows an agency "to consider race [among other factors] when making adoptive placement recommendations." (App. 27). Md. Fam. L. Code § 5-311(b)(2); Code of Maryland Regulations (COMAR) 07.02.12.12A and B (prohibiting an agency director from withholding consent to adoption solely on the basis of race).[3]

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[3] In their petition for the writ of certiorari, Petitioners - for the first time - appear to be asserting that <u>any</u> consideration of race in adoption or foster care decisions is unconstitutional. (Petition at 13, 19, 20). That issue was never presented to or decided by the lower courts. In the courts below, Petitioners argued only that WCDSS impermissibly used race, not as the sole factor, but as the primary or decisive factor, in their case. This Court has

(continued...)

Finally, the court rejected the Petitioners' efforts to assert the rights of the general foster care population in Washington County, Maryland. (App. 24, 26, 27).

REASONS FOR DENYING THE WRIT

THE PETITIONERS ARE NOT ENTITLED TO ANY RELIEF BECAUSE THERE IS NO CASE OR CONTROVERSY.

Review of this case is unwarranted because Petitioners have no discernable remedy and, therefore, cannot "satisfy the threshold requirement imposed by Art. III of the Constitution by alleging an actual case or controversy." City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983) (citing Flast v. Cohen, 392 U.S. 83, 94-101 (1968)). The case or controversy requirement demands that a plaintiff demonstrate "a personal stake in the outcome" of the case. Baker v. Carr, 369 U.S. 186, 204 (1962). Petitioners here have no such personal stake.

First, Petitioners must establish an injury or threat of injury that the outcome of this case would redress. This requirement is not satisfied by mere speculation that Petitioners may be injured in the future: "Abstract injury is not enough." Lyons, 461 U.S. at 101 (citations omitted). Nor is "a hypothetical threat . . . enough." Golden v. Zwickler, 394 U.S. 103, 110 (1969) (quoting United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75, 90 (1947)). Rather, the threat of future injury must be real and immediate at the time equitable relief issues. Golden, 394

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[3](...continued)
refused consistently to decide federal constitutional issues neither presented to nor decided by the lower court. Webb v. Webb, 451 U.S. 493, 498-99 (1981); Dothard v. Rawlinson, 433 U.S. 321, 323 n.1 (1977); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970).

U.S. at 109. See also Ashcroft v. Mattis, 431 U.S. 171 (1977). There must be a "'likelihood of substantial and immediate irreparable injury.'" Lyons, 461 U.S. at 111 (quoting O'Shea v. Littleton, 414 U.S. 488, 502 (1974)).

Petitioners' fear of future discrimination falls far short of establishing "a real and immediate threat of future injury by the defendant." Lyons, 461 U.S. at 107 n.8. Even assuming that Petitioners were wronged in this action, such "[p]ast exposure to illegal conduct," would not establish a threat of future harm. O'Shea, 414 U.S. at 495-96. This is particularly true, as the Maryland Court of Special Appeals found, in light of the provision of Maryland law prohibiting the exact conduct about which petitioners are complaining - the use of race as the sole factor in adoptive placements. Md. Fam. L. Code § 5-311(b)(2).[4] Further, there was no basis in the record to conclude that WCDSS had a "policy and practice" that it would follow in other cases to preclude transracial placements. (App. 56). Indeed, Petitioners' adoption of an African-American and a bi-racial foster child itself evidenced that the WCDSS had no such policy or practice. (App. 5).

Second, in order to establish a personal stake in the outcome of this case, Petitioners must show that the threatened injury is "likely to be redressed by a favorable judicial decision." Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990). Here, however, there is no discernable remedy available to Petitioners. Because Tiffany has already been adopted -- an act that Petitioners do not seek to have undone -- no court can redress their claim that they were her proper adoptive parents.

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[4] Section 5-311(b)(2) was "enacted to resolve situations in which potential adoptive parents request consent from a child placement agency and are rejected based solely on their race. . . ." (App. 16).

Nor are Petitioners entitled to monetary relief, because they filed suit against a State official in his official capacity. As a State official, sued only in his official capacity, Mr. Engle is not a person subject to suit under 42 U.S.C. § 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989). Petitioners' attempt to sidestep this bar to monetary relief with the allegation that Mr. Engle was not acting in his State capacity "when he failed to apply the State law correctly but rather applied local policy" is, as the courts below found, "completely specious and without merit." (App. 53).

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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